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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

No.

77-1835

NATIONAL ASSOCIATION OF  
REGULATORY UTILITY COMMISSIONERS,

*Petitioner,*

v.

BROOKHAVEN CABLE TV, INC.; CAPITOL  
CABLEVISION, INC.; SAMSON CABLEVISION CORP.;  
TELEPROMPTER ELECTRONICS CORPORATION;  
WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE  
TELEVISION ASSOCIATION, INC.; NEW YORK  
STATE CABLE TELEVISION ASSOCIATION; and  
HOME BOX OFFICE, INC.,

*Respondents.*

**PETITION FOR A WRIT OF  
CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

PAUL RODGERS

*General Counsel*

CHARLES A. SCHNEIDER

*Assistant General Counsel*

WILLIAM R. NUSBAUM

*Deputy Assistant General Counsel*

National Association of Regulatory  
Utility Commissioners  
1102 ICC Building  
Post Office Box 684  
Washington, D.C. 20044

June 27, 1978

*Counsel for Petitioner*

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Petitioner, the National Association of Regulatory Utility Commissioners, respectfully prays that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Second Circuit entered on March 29, 1978.

**OPINIONS BELOW**

The opinion of the Court of Appeals, which has not yet been generally reported, appears at Appendix A to this petition. The Court of Appeals affirmed the decision of the

United States District Court of the Northern District of New York, Port, J., which has also not yet been generally reported, and which appears at Appendix B.<sup>1</sup>

### JURISDICTION

The judgement of the Court of Appeals was entered on March 29, 1978. This petition is filed less than 90 days from that date pursuant to Supreme Court Rule 22. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erred in affirming a decision by the United States District Court for the Northern District of New York that the Federal Communications Commission [FCC or Commission] has the jurisdiction to preempt State regulation of rates charged for pay cable television, where this Court's consistent interpretation of FCC authority over cable television has been that the Commission's jurisdiction is limited to actions "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." [*United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 20 L. Ed. 2d 1001, 1016, 88 S. Ct. 1994 (1968)]?

2. Whether the United States Court of Appeals for the Second Circuit erred in affirming a decision by the United States District Court for the Northern District of New York allowing a Federal agency to preempt valid State regulation

<sup>1</sup>Petitioner NARUC has joined with petitioner Commissioners of the New York State Commission on Cable Television in preparing a Joint Appendix which has been separately bound in a companion volume, hereinafter cited as "App."

of a particular field without determining any need for Federal regulation, for no purpose other than to preclude State regulation, and where Congress did not intend that the Federal agency should fully occupy the field.

### STATUTORY PROVISIONS INVOLVED

1. Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.* (1970).
2. Chapter 466 of the Laws of 1972 of the State of New York, Article 28 (§§811-831).

### STATEMENT OF THE CASE

Cable television (CATV) was developed over 30 years ago basically to provide retransmission of over-the-air broadcast signals to persons who, because of location, could not adequately receive a direct signal. These individuals would subscribe to cable services for a flat monthly fee. As cable became more sophisticated, additional services were added including the transmission of locally originated programming and informational programming.

Within the past five years, cable companies have been offering an additional service, at a separate rate, over non-broadcast programming channels. This service, known as "pay cable", is offered at a per-program or per-channel charge, and enables subscribers to view first run movies and sports events, without commercials, not available to the general public through conventional television broadcasting.

From a regulatory point-of-view, there is no major difference between the two types of services, yet the FCC has specifically ruled that localities should regulate the rates of ordinary subscriber cable television, whereas, the Court of Appeals in the decision under review herein, has held that

the FCC has preempted local and State regulation of pay cable rules.

In 1972, Article 28 of the New York Executive Law was enacted to provide for the comprehensive regulation of cable television companies operating within New York. [Chapter 466 of the Laws of 1972 of the State of New York, See Appendix F.] To administer the provisions of this new law, the New York State Commission on Cable Television (State Commission) was established.

Executive Law, Article 28, confers upon the State Commission various duties and responsibilities concerning the franchising process and the content of franchise agreements (Executive Law, §815). Executive Law, Section 825, provides, in part, that the rates charged by a cable television company must be those specified in its franchise agreement and cannot be changed except by amendment of the franchise. Executive Law, Section 822, provides that no amendment of a franchise agreement is effective without the approval of the State Commission. Executive Law, Section 821, provides that no person shall exercise a franchise, nor shall any franchise be effective, until the State Commission has confirmed the franchise by issuing a certificate of confirmation.

On March 1, 1976, the State Commission issued a *Clarification of Commission Policy* which stated, in pertinent part:

1. All subscriber rates imposed by cable television companies in New York must be authorized by the local franchise held by such companies, as required by Section 825 of the Executive Law.
2. No change in subscriber rates may be adopted without an appropriate amendment of the governing franchise.

3. Any such franchise amendment must be approved by this Commission before it may be effective, as provided in Section 822 of the Executive Law.
4. No exclusion or exemption from the above is provided by State Law for rates for any pay, auxiliary or subscription cable service.
5. Cable television companies that have already established pay cable services without following the appropriate legal requirements, as described above, will not be required at this time to make immediate efforts to amend their respective franchises. Such companies must however, file a formal notice with their respective municipalities and this Commission within the next two months, describing the nature of their pay cable services and the rates currently charged to subscribers for such services. Those cable television companies providing pay cable services and not so on record with their respective municipalities and this Commission by April 30, 1976, will face appropriate sanctions.
6. Active enforcement of these policies will be undertaken.

*Clarification of Commission Policy, In the Matter of Rates Charged by Cable Television Companies for "Auxiliary" Programming (Docket No. 90010, March 1, 1976) [hereinafter cited as Clarification or Clarification of Commission Policy; Appendix E].*

In response to this *Clarification of Commission Policy*, an action was instituted by the respondents, five cable

television system companies, two trade associations, and Home Box Office, Inc., a supplier of pay cable programming to cable television systems. In their complaint, filed April 7, 1976, the respondents, attempting to challenge the power of the State Commission to regulate the prices charged for pay cable, asserted four claims of relief: that the *Clarification* was in violation of the Supremacy Clause of the Constitution of the United States (art. VI, cl. 2), the Commerce Clause (art. I, §18, cl. 3), the First Amendment (free speech), and the Fourteenth Amendment (equal protection).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, respondents moved for summary judgement on the first claim of relief, that the Federal Communications Commission [FCC] has preempted State regulation of rates charged for pay cable. In addition, the respondents sought to enjoin the Commissioners of the State Commission from implementing the *Clarification*.

On April 30, 1976, the Commissioners, by their attorney, the Attorney General of the State of New York, filed an answer and a cross-motion for summary judgement seeking a declaration that the Commission's *Clarification* does not violate the Supremacy Clause of the United States Constitution.

In an effort to protect the valid State interest in the regulation of local activities, the NARUC, on June 4, 1976, filed a motion to intervene, an answer, and a memorandum of law in support of the State Commission's cross-motion for summary judgement. NARUC's motion, as well as the FCC and the United States of America's motions to intervene for the cable companies, were subsequently granted by the Court. A motion submitted by the City of New York seeking leave to participate in the proceeding as *amicus curiae* was also granted.

Briefs were filed and oral argument was heard before Judge Port in the District Court on June 14, 1976. In his decision, entered on May 12, 1977, Judge Port granted the respondents' motion for summary judgement holding that State regulation of rates charged for pay cable has been effectively preempted by the FCC. In addition, the Court issued an injunction prohibiting the New York State Commission from regulating the rates charged for pay cable.

Citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968) and *United States v. Midwest Video Corp.*, 406 U.S. 649, 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972), the District Court ruled that since pay cable television increases programming diversity, an area in which the Supreme Court has allowed FCC regulation [*Midwest Video*], it must follow that any FCC action which might perhaps also increase programming diversity must be permitted. The Court expressed its belief that any FCC efforts to "nurture and protect this infant medium" [i.e. pay cable] will increase program variety. It concluded that Federal preemption of pay cable rate regulation will "nurture and protect" pay cable, enabling it to grow, and therefore, such preemption must increase programming diversity and thus must be valid. [District Court Slip Op. App. B.]

Notices of appeal were subsequently filed by the State Commission and the NARUC. After briefing and oral argument before the Court of Appeals for the Second Circuit, the Court, on March 29, 1978, issued its decision affirming the District Court's ruling.

In its affirmance, the Court of Appeals reiterated the logic posed by the District Court and ruled, in essence, that any FCC action relating to cable television which perhaps increases programming diversity is *per se* "ancillary to the regulation of broadcasting" and is thus valid.

## REASONS FOR GRANTING CERTIORARI

The Court should grant the petition for writ of certiorari for the following reasons:

1. The decision of the Court of Appeals is in direct conflict with decisions of the Eighth and District of Columbia Circuits construing the scope of FCC jurisdiction over cable television as interpreted by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968), and *United States v. Midwest Video Corp.*, 406 U.S. 649, 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972).

2. The decision of the Court of Appeals establishes a completely novel interpretation of law relating to Federal-State regulatory power, in conflict with all Supreme Court decisions on the matter, by allowing the preemption of valid State jurisdiction by a Federal agency, where such agency has no specific Congressional authority to enter the field, where there has been found no compelling need for Federal regulation, and where the agency's expressed and only motivation is its desire to preclude lawful State regulation.

### I. CONFLICT WITH OTHER DECISIONS RELATING TO THE SCOPE OF FCC JURISDICTION

It is well-established that there is no Congressional scheme or design regarding Federal regulation of cable television. Nowhere in the Communications Act of 1934 (47 U.S.C. §151, *et seq.*), nor in the various amendments to that Act, was the FCC granted the authority and power to regulate CATV. The FCC's authority in this area has evolved *solely* through judicial interpretation of the Communications Act and thus, for the FCC to validly preempt State regulation of pay cable rates, such preemption must specifically flow from these judicial decisions.

In 1968, this Court established the basic limits of FCC jurisdiction over the regulation of cable television by ruling that in order for the FCC to have any authority over a particular aspect of CATV, the Commission must establish that the area to be regulated must have a reasonable ancillary relationship to the FCC's authority over television broadcasting. This test was established in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968), wherein the Court stated:

*... the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with Law," as "public convenience, interest, or necessity requires." 47 U.S.C. §303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.*

392 U.S. at 178, 20 L. Ed. 2d at 1016 [Emphasis Supplied].

Several cases subsequent to *Southwestern Cable* have elaborated upon the basic "ancillary to the regulation of broadcasting" test. The NARUC submits that all Circuits which have looked at the jurisdictional issue have consistently ruled that there are strict limits on FCC authority over the regulation of CATV. However, the Second Circuit's decision in the *Brookhaven* case clearly represents a departure from accepted analysis and results in a tremendous expansion in FCC jurisdiction irreconcilably conflicting with the decisions of the other Circuits and with the Supreme Court.

The first case interpreting the *Southwestern Cable* standard was *United States v. Midwest Video Corp.*, 406 U.S. 649, 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972) [*Midwest Video I*] where a sharply divided court upheld an FCC requirement that cable system operators must not only engage in television rebroadcasting, but must also originate programs of their own. Chief Justice Burger, in concurring with the plurality stated:

Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open ended and pervasive jurisdiction that has evolved by decision of the Commission and the Courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development so that the basic policies are considered by Congress and not left entirely to the Commission and the Courts.

406 U.S. at 676, 32 L. Ed. 2d at 407.

In *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) [*NARUC II*] the Court of Appeals held that an order of the FCC which preempted State regulation over use of CATV system leased access channels for two-way, point-to-point non-video communications was not within the discretion accorded the FCC. On the issue of the jurisdiction of the FCC over CATV the Court held:

We are not persuaded that either the statute on its face or the construction which it has been given in *Southwestern* and *Midwest* supports the Commission's argument that it has a blanket jurisdiction over all activities which cable systems may carry on. The language of §152(a) is quite general and is not unambiguously jurisdictional in character. (footnote omitted.) *There is nothing in*

*the words themselves compelling a conclusion that any or all operations of a cable system are within the ambit of Commission power. . . .* The Court [in *Southwestern* and *Midwest*] thus was not recognizing any sweeping authority over the entity as a whole, but was commanding that *each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting.*

533 F.2d at 612 [Emphasis Supplied].

In 1977, the District of Columbia Circuit again ruled on FCC jurisdiction over cable television. In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 54 L. Ed. 2d 89 (1977) [*HBO*], the Court held that FCC rules pertaining to the siphoning of broadcast programming by cable television systems were invalid. Again the Court discussed FCC jurisdiction over CATV generally and stated that:

The Supreme Court's opinions in *Southwestern Cable Co.* and *Midwest Video Corp.* thus look in two directions. First they recognize an expansive jurisdiction for the Commission based on Section 2(a) of the Communications Act and the need to give the Commission sufficient latitude to cope with technological developments in a rapidly changing field. But the opinions are also narrow. Even the broadest opinion, that of the plurality in *Midwest Video Corp.*, recognizes that the Commission can act only for ends for which it could also regulate broadcast television. . . . Finally, the opinions in both cases go no farther than to allow the Commission to regulate to achieve "long-established" goals or to protect its "ultimate purposes." That these cases establish an outer

boundary to the Commission's authority we have no doubt, *cf. National Ass'n of Regulatory Utility Comm'rs. v. FCC, supra; Staff Of Subcomm. On Communications, Comm. On Interstate And Foreign Commerce, Cable Television: Promise Versus Regulatory Performance* 80-83 (1976) (Subcomm. Print), and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television, *cf. Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2229, 2233, 29 L. Ed. 2d 701 (1971).

567 F.2d at 27-28.

The most recent case to analyze FCC jurisdiction over CATV was *Midwest Video Corp. v. FCC*, No. 76-1496 (8th Cir. Feb. 27, 1978), *decision on petitions for cert. pending [MIDWEST Video II]*, where the Court of Appeals for the Eighth Circuit overturned FCC regulations on mandatory access and CATV channel capacity requirements. The Court based its decision on the belief that the rules in question were outside the FCC's jurisdiction.

In discussing the jurisdictional issue, the Court of Appeals ruled that:

The standard established by the Court is "reasonably ancillary," not merely "ancillary." The standard is already broad, and the term "reasonably," requiring some nexus with the Commission's statutory responsibility, must not be read out of it. Nor can there be deleted what

the Court said cable actions must be "reasonably ancillary" to, *i.e.*, "the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. . . . Each regulation of cable television must individually stand or fall, not on legal precedent concerning other regulations, but on whether or not the regulation under review meets the standard established by the Court. The Commission reliance on *Southwestern* and *Midwest Video* ignores the indications in those cases that it has no sweeping jurisdiction over cable television, that whatever jurisdiction it may have is contingent upon its delegated powers, and that each attempt to regulate cable systems must be individually justified. *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

Slip. Op. at 25, 26.

The Court of Appeals for the Second Circuit attempts to distinguish the aforementioned cases on the grounds that those cases dealt with different factual situations. Admittedly, the factual issues presented in *Midwest Video I*, *NARUC II*, *HBO* and *Midwest Video II* are not directly relevant to the instant proceeding. Yet, in each of the cited cases, the Courts construed the basic jurisdiction of the FCC over cable television in order to reach the ultimate conclusion regarding the particular matter at issue. It would be the antithesis of all accepted standards of judicial review to ignore the precedential value of these cases, as the Second Circuit has done, in their interpretations of the limited power of the FCC over cable television.

It is important to note that the decision under review is not one limited to the facts of the case. The Second Circuit's decision not only relates to the Federal preemption of State authority over pay cable rates but has more far-reaching implications.

The FCC herein has adopted a policy, affirmed by the Federal District and Circuit Courts in New York State, that establishes the principal that the FCC has *carte blanche* authority over cable television. Furthermore, the policy endorsed by the lower courts in the *Brookhaven* case, that any FCC action which may perhaps increase programming diversity of cable television systems is *per se* reasonably ancillary to the regulation of broadcast television, is one that is totally in conflict with all other judicial decisions in the CATV area.

Programming diversity may be a valid goal for the FCC to pursue in both the broadcasting and cable fields, however, this goal, like all other regulatory objectives, must be weighed against the basic grant of authority to a Federal agency to act in a particular manner. As the Court in *Mid-west Video II* has stated in discussing FCC objectives:

A court may favor an agency-sponsored [*sic*] policy, while condemning the agency's exercise of unauthorized pursuit of that policy. The nobility of a goal or policy cannot justify usurpation, by the Commission or us, of a power to pursue it in whatever manner we think it might "work."

The fundamental principle that governmental agencies are limited to the exercise of power delegated by the Congress would be nullified if an agency (like Disraeli, who is said to have preferred the power to write the public's slogans over the power to write its laws) were at liberty to expand its jurisdiction, as far and wide as it wished, by the facile, case-by-case step of rewriting the objectives found in the delegating statute. If "jurisdiction" be synonymous with agency-drafted, *ad hoc* "objectives," Congress and the courts become essentially superfluous.

*Id.*, at 32-33.

## II. PREEMPTION OF STATE AUTHORITY

It is well established that if State legislation is not in conflict with or repugnant to the Congressional scheme, the States are *not* preempted from legislating in those areas. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nevada, 1968) *aff'd* 396 U.S. 556, 24 L. Ed. 2d 746, 90 S. Ct. 749 (1970).

In *Savage v. Jones*, 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715 (1912) the Supreme Court, at 533, stated:

But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.

This Court has reiterated the above holding time after time. In *Schwartz v. Texas*, 344 U.S. 199, 97 L. Ed. 231, 73 S. Ct. 232 (1952) the Supreme Court noted that:

If Congress is authorized to act in a field it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

344 U.S. at 202-203, 97 L. Ed. at 235.

In *Head v. New Mexico Board*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963), the Supreme Court, in discussing preemption under the Communications Act of 1934, stated (at 429-430):

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of federal regulation under the Federal Communications Act. "[T]he 'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belong to it as to exclude the State, must be answered by a judgement upon the particular case'. Statements concerning the 'exclusive jurisdiction of Congress' beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California v. Zook*, 366 U.S. 725, 731, 93 L. Ed. 1005, 1010, 69 S. Ct. 841. *Kelly v. Washington*, 302 U.S. 1, 10-13, 82 L. Ed. 3, 10, 12, 58 S. Ct. 87. *In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, (or) evidence of a Congressional design to preempt the field."* *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141, 10 L. Ed. 2d 248, 256, 83 S. Ct. 1210 (Emphasis Supplied.)

It is the NARUC's contention that the Second Circuit Court has totally ignored Supreme Court mandates in this area. It appears from the *Brookhaven* decision that the Court of Appeals believes that the exercise of Federal supremacy is lightly to be presumed and that the intent of the agency, rather than Congress, is the deciding factor. As the Court of Appeals in the *Brookhaven* case stated:

The policy to preempt has been shouted from the rooftops, see *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), and the FCC has explicitly indicated its intent that there be no price regulation whatever of the relevant area, see *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773-74 (1947).

Slip Op. at 2167, App. A.

The NARUC submits that the Second Circuit has completely misconstrued the decisions in the cited cases and has, in effect, ruled that a Federal agency can define the parameters of its own jurisdiction even when that agency has not been granted any Congressional authority to regulate a specific field and even though the agency has no intention of regulating at the Federal level.

In *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026 (1946), the Supreme Court ruled that the State of New York was precluded from permitting the unionization of Bethlehem's foremen despite Federal inaction in this area. However, the case turned upon the fact that the National Labor Relations Act, 49 Stat. 449, had specifically authorized the National Labor Relations Board to determine and certify appropriate bargaining units. Thus, regardless of Federal action or inaction, the States were precluded from certifying bargaining units. See also: *Oregon-Washington Railroad & Navigation Co. v. Washington*, 270 U.S. 87, 70 L. Ed. 482, 46 S. Ct. 279 (1926) [where the inaction of the Secretary of Agriculture was held not to allow State action since "the obligation to act without respect to the States is put directly on the Secretary. . . ." *Id.* at 102-3], and *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958) [where the ICC had specific authority over local inter-terminal motor vehicle transportation of

railroad passengers, thereby precluding regulation by the city].

In *Bethlehem*, the Supreme Court, in discussing the range of permissible State action in the face of Federal activity or lack thereof, stated, at 773-775:

When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, *might preclude state action if it is clear that Congress has intended no regulation except its own . . . In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised . . . But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. . . However, when federal administration has been slight under a statute which potentially allows minute and multitudinous regulation of its subject . . . or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision*

*awaits federal administrative regulation. . . The states are in those cases permitted to use their police power in the interval . . . However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute. . .*

*It is clear that the failure of the National Labor Relations Board to entertain foremen's petitions was of the latter class. (Emphasis supplied.)*

The Supreme Court in *Bethlehem* was specifically ruling that Federal preemption of the State role, in conjunction with Federal inaction as to specific Federal regulations, was mandated by statute. The lesson to be learned from *Bethlehem* is clear, *i.e.* that a Federal agency must have Congressional authority to preclude State action in a given field (*e.g.* rates, licensing, or certifying collective bargaining units) while that agency also refuses to specify Federal guidelines.

Considering that there is no specific statutory authority for FCC preemption of pay cable rate regulation, and that the judicial interpretation of FCC authority over CATV is fairly limited in scope (*i.e.*: "reasonably ancillary to broadcasting"), then any FCC preemption of State regulation of pay cable rates through mere policy statements and without specific Federal guidelines is an abuse of Federal power.

The NARUC believes that an agency certainly has the power to decide the extent of regulation necessary to achieve a stated purpose where plenary authority has been vested in that agency by Congress. But where Congress has not commanded that a field be regulated on the Federal level and the agency can only claim under authority peripheral to Congress' stated intent, *i.e.* ancillary to broadcasting, the States' power remains supreme. Here,

there has been no need shown for regulation on the Federal level and the usurpation of State power has become the end in itself.

It is therefore quite clear that the FCC here is attempting an action not previously allowed by any court. The FCC has attempted preemption in this area not for the purpose of regulating, but for the sole purpose of precluding lawful State involvement. Such an action by a Federal agency, where no conflict between Federal/State regulatory schemes exist, where no adequate need has been shown, and where no statutory authority exists, is surely invalid since it completely places valid State regulation at the whim of the Federal agency.

#### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PAUL RODGERS  
*General Counsel*

CHARLES A. SCHNEIDER  
*Assistant General Counsel*

WILLIAM R. NUSBAUM  
*Deputy Assistant General Counsel*

National Association of Regulatory  
Utility Commissioners  
1102 ICC Building  
Post Office Box 684  
Washington, D.C. 20044  
  
*Counsel for Petitioner*

*June 27, 1977*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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No.

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NATIONAL ASSOCIATION OF  
REGULATORY UTILITY COMMISSIONERS,  
*Petitioner.*

v.

BROOKHAVEN CABLE TV, INC.; CAPITOL  
CABLEVISION, INC.; SAMSON CABLEVISION CORP.;  
TELEPROMPTER ELECTRONICS CORPORATION;  
WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE  
TELEVISION ASSOCIATION, INC.; NEW YORK  
STATE CABLE TELEVISION ASSOCIATION; and  
HOME BOX OFFICE, INC.,

*Respondents.*

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**PETITION FOR A WRIT OF  
CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of June, 1978 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Counsel for all Respondents, as shown on the list below. I further certify that all parties required to be served have been served.

Paul, Weiss, Rifkind, Wharton  
& Garrison

(First Class)

Stuart Rodinowitz, Esquire  
Robert S. Smith, Esquire  
Susan P. Carr, Esquire  
Jack A. Horn, Esquire  
345 Park Avenue  
New York, New York 10022

Wade H. McCree, Esquire  
Solicitor General of the United States  
Department of Justice  
Washington, D.C. 20530

(First Class)

Eloise E. Davies, Esquire  
Leonard Shaitman, Esquire  
Department of Justice  
Civil Division, Appellate Section  
Washington, D.C. 20530

(First Class)

Daniel M. Armstrong, Esquire  
Gregory Christopher, Esquire  
Lauren Belvin, Esquire  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

(First Class)

Louis J. Lefkowitz, Esquire  
Attorney General of the State of  
New York  
Charles A. Bradley, Esquire  
Principle Attorney  
2 World Trade Center  
45th Floor  
New York, New York 10047

(First Class)

New York State Commission on  
Cable Television  
Robert F. Kelly, Chairman  
Joshua N. Koenig, Esquire  
Tower Building  
Empire State Plaza  
Albany, New York 12223

(First Class)

Gustave J. DiBianco, Esquire  
Assistant United States Attorney  
United States Attorney's Office  
Northern District of New York  
Albany, New York 12201

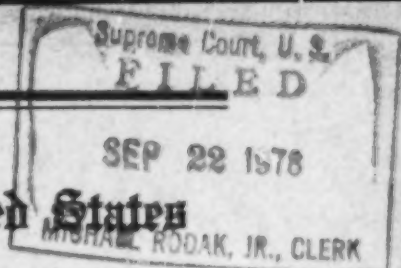
(First Class)

W. Bernard Richland  
Alexander Gigante, Jr., Esquire  
Evelyn J. Junge, Esquire  
Corporation Counsel  
Municipal Building  
New York, New York 10007

(First Class)

/s/ William R. Nusbaum  
WILLIAM R. NUSBAUM  
*Deputy Assistant General Counsel*  
National Association of Regulatory  
Utility Commissioners  
1102 ICC Building  
Post Office Box 684  
Washington, D.C. 20044

IN THE  
**Supreme Court of the United States**  
October Term, 1978



**Nos. 77-1835, 77-1845**

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice-Chairman; MICHAEL H. PRENDERGAST; ELI WAGNER; and EDWARD J. WEGMAN, Commissioners of the New York State Commission on Cable Television,

and

NATIONAL ASSOCIATION OF  
REGULATORY UTILITY COMMISSIONERS,  
*Petitioners,*

*v.*

BROOKHAVEN CABLE TV INC., *et al.*, the UNITED STATES OF AMERICA, and the FEDERAL COMMUNICATIONS COMMISSION,  
*Respondents.*

**On Petition for Writs of Certiorari to the  
United States Court of Appeals  
for the Second Circuit**

**BRIEF IN OPPOSITION TO PETITIONS FOR WRITS  
OF CERTIORARI ON BEHALF OF RESPONDENTS  
BROOKHAVEN CABLE TV, INC., CAPITOL CABLE-  
VISION, INC., SAMSON CABLEVISION CORP.,  
TELEPROMPTER ELECTRONICS CORPORATION,  
WARNER CABLE OF OLEAN, INC., NATIONAL  
CABLE TELEVISION ASSOCIATION, INC., NEW  
YORK STATE CABLE TELEVISION ASSOCIA-  
TION, and HOME BOX OFFICE, INC.**

STUART ROBINOWITZ  
ROBERT S. SMITH  
SUSAN P. CARR  
JACK A. HORN  
PAUL, WEISS, RIFKIND,  
WHARTON & GARRISON  
345 Park Avenue  
New York, New York 10022

September 22, 1978

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**Supreme Court of the United States**

October Term, 1978

Nos. 77-1835, 77-1845

and

NATIONAL ASSOCIATION OF  
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AMERICA, and the FEDERAL COMMUNICATIONS COMMISSION,  
*Respondents.*On Petition for Writs of Certiorari to the  
United States Court of Appeals  
for the Second CircuitBRIEF IN OPPOSITION TO PETITIONS FOR WRITS  
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BROOKHAVEN CABLE TV, INC., CAPITOL CABLE-  
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WARNER CABLE OF OLEAN, INC., NATIONAL  
CABLE TELEVISION ASSOCIATION, INC., NEW  
YORK STATE CABLE TELEVISION ASSOCIA-  
TION, and HOME BOX OFFICE, INC.This brief is submitted by respondent cable television  
companies in opposition to the petitions for writs of cer-  
tiorari filed by the Commissioners of the New York State

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Commission on Cable Television ("State Commission") and by the National Association of Regulatory Utility Commissioners ("NARUC").

### Questions Presented

1. Whether the Federal Communications Commission ("FCC") has the authority to preempt state and local price regulation of pay cable and permit free marketplace experimentation for this new communications medium, where the FCC has a long-standing and judicially-approved identical policy of non-interference in the pay television broadcasting field?

2. Whether the means used by the FCC to preempt price regulation were adequate and effective, where the FCC made a series of official statements in public proceedings over a period of almost a decade?

### Counter-Statement of the Case

This case involves two new media—pay cable and over-the-air pay television ("STV")—which compete with each other and a well-established FCC policy designed to encourage the development of both emerging technologies by permitting experimentation in a free market environment without bureaucratic interference by a myriad of state and local officials. The FCC's preemption policy as to STV has previously been upheld in *National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969) ("NATO"). This Court denied certiorari in that case. 397 U.S. 922 (1970). Here, the Court of Appeals for the

Second Circuit merely upheld the parallel FCC policy for pay cable, finding it to be "reasonably ancillary" to the FCC's policies in the field of STV television broadcasting.

### Pay Cable and STV

Pay cable and STV offer subscribers similar programs without commercials—primarily, recent motion pictures, sports and other special events, not available on conventional television. In some cases, the price for each individual program is set on a separate per-program basis. In other cases, a single monthly subscription charge is made for a channel offering a schedule of programs.

STV and pay cable compete not only with each other, but also with theatres, sports arenas, concert halls and other entertainment media whose prices are not controlled by any governmental officials. Prices for STV and pay cable programs are a fraction of regular box-office prices.<sup>1</sup>

Pay cable and STV offer their services in interstate commerce by means of new technological developments. Television stations offer STV programs via scrambled over-the-air broadcast signals which are unscrambled by special decoders rented by subscribers. Cable television systems present pay programs on channels not being used for the retransmission of regular television signals or for cablecasts. Cable systems generally receive their pay program schedules from a national interstate network service by means of simultaneous transmissions via domestic satel-

1. For example, for a family of four, current motion pictures on pay cable generally cost only about an average of 20¢ to 30¢ per person versus \$2 to \$4 per ticket at theatres.

lites, microwave and other interstate common carrier services licensed by the FCC.

In major markets, such as New York and Los Angeles, STV and pay cable have both commenced operations and are in head-to-head competition, often offering the same motion pictures. In addition, there have recently been many grants of, and applications for, STV licenses in markets in which pay cable is already operating. In a few experimental cases, cable systems offer both pay cable programs and the STV signals of a local television station. The two new media are thus inter-related and have started direct competition with each other, as well as with other media.

#### FCC Regulation

In 1968, after almost two decades of deliberations and close consultation with Congress, the FCC authorized STV and concluded that prices for programs should be left to the free play of market forces, at least at the outset and in the absence of any demonstrated need for regulation.<sup>2</sup> The FCC's action was upheld in the *NATO* case.

In 1969, the FCC authorized pay cable.<sup>3</sup> The FCC determined to treat pay cable and STV in the same basic manner. Thus, after notifying Congress of its intentions<sup>4</sup> and in numerous proceedings between 1969 and 1977, the

2. *Fourth Report and Order*, 15 F.C.C.2d 466, 548 (1968).

3. *First Report and Order in Docket 18397*, 20 F.C.C.2d 201, 202 (1969).

4. *In re Commission Proposals for Regulation of Cable Television*, 31 F.C.C.2d 115, 130 (1971).

FCC has preempted the field of pay cable regulation and declared that the prices for motion pictures, sports and other programs on pay cable—like prices for such programs on STV—should be determined by marketplace forces and not regulators, at least during an experimental period and in the absence of empirical evidence of the necessity for any regulation.<sup>5</sup>

For example, in rejecting repeated proposals by petitioner NARUC to subject cable television to state common carrier regulation, the FCC declared in 1974:

“After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any government level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development. This is precisely what we are trying to avoid.”<sup>6</sup>

5. *Report and Order in Docket 21002*, 66 F.C.C.2d 380, 402, n. 21 (1977); *Notice of Inquiry in Docket 20767*, 58 F.C.C.2d 915, 915-16 (1976); *First Report and Order in Dockets 19554 and 18893*, 52 F.C.C.2d 1, 67-68 (1975), *reconsideration denied*, 54 F.C.C.2d 797 (1975); *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 185-186, 199-200 (1974); *Lake County Cable TV, Inc.*, 28 Pike & Fischer Radio Reg. 2d 602 (1973); *CATV of Rockford, Inc.*, 38 F.C.C.2d 10 (1972), *reconsideration denied*, 40 F.C.C.2d 493 (1973); *Cable Television Report and Order*, 36 F.C.C.2d 143, 193 (1972); *Request by Time-Life Broadcast, Inc.*, 31 F.C.C.2d 747 (1971); *In re Commission Proposals for Regulation of Cable Television*, 31 F.C.C.2d 115, 130 (1971); *Clarification of CATV First Report as to Scope of Federal Preemption*, 20 F.C.C.2d 741 (1969).

6. *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 199-200 (1974).

Similarly, in denying requests for rate regulation by the New York State Commission, the FCC ruled in 1975:

"Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content. We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful, including most particularly free television, motion picture theaters, live sports, and other entertainment events. As we said with respect to over-the-air subscription rates:

The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid and that if they are excessive, the operations will not succeed. . .

In any case, we believe that the complex nature of subscription cablecasting and broadcasting, with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level." (footnote omitted)<sup>7</sup>

The petitioners did not appeal the FCC's preemption opinions. Instead, the State Commission—although obligated to act in conformity with FCC policies under its enabling statute<sup>8</sup>—issued a policy statement in 1976 ex-

7. *First Report and Order in Dockets 19554 and 18893*, 52 F.C.C.2d 1, 67-68 (1975); *reconsideration denied*, 54 F.C.C.2d 797 (1975).

8. As the District Court noted (24a), the New York statute creating the state agency in 1972 expressly recognized that its regulation of cable must be "consonant with policies, regulations and statutes of the federal government."

pressing its disagreement with the "wisdom" of the FCC's action and indicating its intention to regulate pay cable prices (42a).<sup>9</sup> This lawsuit followed. The United States, the FCC and respondent cable companies promptly moved for summary judgment declaring, *inter alia*, that the action by the State Commission had been preempted by the FCC and was thus invalid under the Supremacy Clause of the United States Constitution (Art. VI, cl. 2).<sup>10</sup>

### The Opinions Below

The courts below, granting summary judgment, unanimously upheld the FCC's preemption policy, relying on *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and *NATO*.

The District Court (Port, J.) stated:

"The FCC has determined that rates for pay cable TV should be set by marketplace forces and not regulated by state or local authorities. The rationale behind this decision is simply that rate regulation can be expected to chill development of the new medium, whereas a free market environment should enable it to grow. Since the FCC has also determined that pay cable TV will increase programming diversity, it follows that efforts to nurture and protect this infant

9. Page references followed by "a" are to the Appendix to the Petition of the State Commission.

10. The respondent cable companies also challenged the State Commission's action as void under the First Amendment; as a denial of Equal Protection under the Fourteenth Amendment because no other free-speech medium is subject to price controls; and as an improper burden on interstate commerce. The summary judgment motion, however, was directed solely to the issue of federal preemption.

medium will, likewise, result in an increase in programming variety. This same rationale supported an earlier decision of the FCC to preclude rate regulation of another infant medium, subscription television.” (21a-22a)

In granting summary judgment, the District Court also found that cable television is a “capital intensive enterprise”; that the institution of pay service requires “making long-range plans”; and that the policies of the State Commission had severely retarded and hampered the growth of pay cable in New York State (26a-27a)—factual findings not challenged by petitioners.

The Second Circuit (Lumbard, Oakes, Wyzanski, JJ.), unanimously affirming, stated:

“A decision to delay all price regulation of special pay cable meets that test [of ancillary jurisdiction established by this Court in *Midwest*]; a policy of permitting development free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules approved in *Midwest Video*, *supra*. Cf. *National Association of Theatre Owners v. FCC*, 420 F.2d 194, 203 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (upholding FCC’s non-regulation policy in subscription television field pending accumulation of expertise).” (4a)

### Reasons for Not Granting Certiorari

It is clear that the FCC has the authority to preempt regulation of pay cable, just as in the case of STV, in order to encourage the development of both new media and to promote diversity of programs and services for viewers in

a free-market environment. Preemption of pay cable rate regulation is “reasonably ancillary”—indeed it is identical—to long-established and judicially-approved policies in the television broadcasting field. The New York Commission is the only state agency to take a contrary position. The FCC effectively exercised its power of preemption in a series of explicit statements over the past decade. This is a classic case of federal preemption because here there is a direct clash between federal and state policies.

### I

**The FCC has the power to preempt and prohibit state and local price controls of programs offered by pay cable.**

The FCC’s preemption of regulation of pay cable parallels its long-established policies in the television broadcasting field and is well within the Commission’s broad mandate to foster new communications media, to promote greater diversity of programs and program sources for viewers, and to encourage free competition in the communications field. Those goals are the *raison d’etre* for FCC regulation.<sup>11</sup>

In *Southwestern*, *supra*, this Court held that the FCC’s jurisdiction over cable television was “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcast-

11. *FCC v. National Citizen’s Committee for Broadcasting*, 58 S.Ct. 2096 (1978); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 376-80 (1969); *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943); *FCC v. Sander Bros. Radio Station*, 309 U.S. 470, 473-76 (1940).

ing" (392 U.S. at 178). This Court also stressed that "CATV systems are engaged in interstate communications" and that the FCC "was expected to serve as the 'single Government agency' with 'unified jurisdiction' " in formulating " 'a unified and comprehensive regulatory system' " (392 U.S. at 168; footnotes omitted).

Subsequently, in *Midwest Video, supra*, this Court upheld the FCC's authority to require cable systems to originate non-broadcast programs. The Court held that the origination rules were "reasonably ancillary" to "the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services" (406 U.S. at 667-68). This Court added:

"Equally plainly the broadcasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming—the same objective underlying regulations sustained in *National Broadcasting Co. v. United States, supra*, as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld." (406 U.S. at 669)

*Midwest* is a *fortiori* here. Since *Midwest* holds that the FCC has the authority to compel cable television companies to originate programs in order to increase diversity

for viewers, the FCC clearly has the power to prevent interference with that goal by regulations by a myriad of state and local bureaucrats scattered across the nation. Indeed, the District Court here found that the policies of the state agency had retarded the development of pay cable in New York State (26a).

In addition to this Court's opinions in *Midwest* and *Southwestern*, the courts below relied on *NATO, supra*, in which this Court denied certiorari. There, the D.C. Circuit, upholding the FCC's policy against regulating the prices of STV programs, stated:

"[W]e are not prepared to hold that the Commission was arbitrary and capricious in determining that a substantial amount of economic competition would exist between STV and other forms of entertainment and enlightenment available in the community. Courts should be very reluctant, we think, to declare that free market forces must be supplanted by rate regulation when neither Congress nor the agency administering the area has found that such regulation is essential." 420 F.2d at 204. (footnote omitted).

Thus, the FCC's policy as to pay cable is not merely "ancillary" to its policy in the television broadcasting field: it is identical. It would be anomalous if the prices charged for a popular film on STV were left to the free play of market forces while, at the same time, prices for that same film on pay cable were set by thousands of bureaucrats across the United States. Such an inconsistency would vitiate the FCC's policy in the broadcasting area, because competitive forces would keep STV prices at the levels set by regulators of pay cable.

Petitioners' principal claim for certiorari is that there is a conflict among the circuits. But the cases cited by petitioners, as the Second Circuit pointed out (4a-5a), do not create any conflicts. Even petitioner NARUC now concedes that those precedents "are not directly relevant" to the instant proceeding (Pet. at 13).

*National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976), one of the principal cases relied on by petitioners, involved two-way, point-to-point, non-video, intrastate services on leased cable channels (such as burglar and fire alarms and survey services)—not video entertainment programming for the general public as to which the court in *NARUC* indicated the FCC *did* have ancillary jurisdiction in order to promote diversity (533 F.2d at 615-16).<sup>12</sup> The Court noted that "origination cablecasting will increase the mix of available viewing choices and thus serve an important general purpose of broadcast regulation" (533 F.2d at 615).

*Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) *cert. denied*, 434 U.S. 829 (1977), another precedent cited by petitioners, invalidated FCC restrictions on the programs eligible for pay cable. The D.C. Circuit there stressed that cable television is entitled to First Amendment protection and should be given an opportunity for experimentation in the marketplace unless and until there is evidence

12. Judge Lumbard, who wrote the decision here for the Second Circuit, cast the decisive concurring vote in *NARUC*. Unlike the disparity created by the non-regulation of burglar alarm and similar services when provided via cable channels as opposed to state-regulation of the identical services when provided by common carrier telephone facilities (533 F.2d at 613), federal preemption in this case assures parallel treatment for pay cable and STV.

demonstrating an overriding need for bureaucratic interference. *HBO* specifically criticized the FCC because of its "choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action" (567 F.2d at 37, n.60). To the same effect, see *Home Box Office, Inc. v. FCC*, No. 77-1878 (D.C. Cir. Sept. 20, 1978, Slip Op. at 15). The foregoing rationale is thus consistent with the FCC's present preemption of regulation for the new media of pay cable and STV.

Finally, in *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *petitions for certiorari filed* ("Midwest II"), another precedent cited by petitioners, the Eighth Circuit invalidated the FCC's access, channel capacity and equipment requirements as not "reasonably ancillary" to broadcasting because those rules constituted an attempt to impose a type of common carrier regulation in the cable field which the FCC was specifically prohibited from imposing in the television broadcasting field (517 F.2d 1040, 1048-51, 1055-56). See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). But here preemption of price regulation of pay cable follows long-standing FCC policies in the broadcasting field.<sup>13</sup>

13. The other precedents cited by petitioners also do not create a conflict with the opinion below. *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963), and *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd*, 396 U.S. 556 (1970), as noted by the District Court (22a-23a), did not hold that the FCC lacked jurisdiction to preempt state regulations. They simply held that in those cases—unlike the instant case—the FCC had chosen not to preempt. *TV Pix*, in fact, expressly recognized the FCC's power to preempt regulation of cable television—a power which the FCC had not yet exercised in 1968 (304 F. Supp. at 465).

The New York Commission (Pet. 19) also refers to its pending certiorari petition (No. 77-1528) in *New York State Commission on Cable Television v. FCC*, 571 F.2d 95 (2d Cir. 1978), and implies

(footnote continued on next page)

## II

**The FCC has effectively exercised the power to preempt.**

There is no basis for the State Commission's claim (Pet. 18) that the FCC "never provided a direct opportunity for the petitioners or any other parties to raise these objections" to the FCC's preemption policy. The State Commission and NARUC did, in fact, argue against preemption in proceedings before the FCC.<sup>14</sup> As the Second Circuit pointed out:

"The Commission and NARUC both participated in the 1974 proceedings cited above, and had ample opportunities to attempt to persuade the FCC of their point of view—which they did—and to take an appeal when they failed—which they did not." (6a)

The State Commission's further claim (Pet. 8-9, 17-18) that the FCC originally delegated pay cable rate regula-

that said petition raises issues as to the scope of the FCC's ancillary jurisdiction over cable television requiring clarification. But in that case, involving a totally different issue (namely, the correctness of an FCC interpretation of its rules as to "grandfathered" franchise fees), the State Commission never even raised any issue below as to the FCC's ancillary jurisdiction to pass the rules—a point conceded in the State Commission's certiorari petition in that case (p. 10).

14. See, e.g. testimony of State Commission's General Counsel in FCC Docket No. 19554, November 3, 1973 (Tr. 609-25), stating that the state agency disagreed with the FCC's preemption policy and had issued its own policy statement asserting jurisdiction to regulate pay cable rates. The FCC rejected that view in its final opinion in that proceeding, as shown *supra* (p. 6). Similarly, from the early days of the FCC's inquiries into cable television regulation, NARUC unsuccessfully urged a non-preemption policy and state common carrier regulation of cable (e.g., NARUC's Comments in Docket No. 18892, October 7, 1970, at 13-18; NARUC's Comments in Docket No. 18397, September 5, 1969, at 9, 11, 13).

tion to localities and then amended that policy without proper notice—a point not raised below—is incorrect. The FCC, as noted by the District Court (12a) and as shown by the precedents cited above (footnote 5), preempted the entire pay cable field from the very outset, long prior to the creation of the state agency.<sup>15</sup> Moreover, the state agency subsequently participated in FCC's proceedings reaffirming the preemption policy.

There is also no merit to petitioner NARUC's *ipse dixit* argument (Pet. 15-20) that the FCC could not preempt state or local rate regulation of pay cable (1) because the Communications Act of 1934 does not specifically deal with this precise issue, and (2) because the FCC does not intend to set prices itself. Under the flexible Act, passed long before the advent of cable or regular television, the FCC has "ancillary jurisdiction" over cable related to its broadcasting policies; and here the pay cable preemption parallels the STV policy. The fact that the FCC has decided against regulating rates itself does not negate its power to prohibit state and local regulation. The FCC has decided that price controls at *any* level—federal, state or local—would be inappropriate for the new technologies of pay cable and STV. *Bethlehem Steel Co. v. New York*

15. The 1972 FCC regulation cited by the State Commission (Pet. 8, 17) allowing local rate regulation referred to "regular subscriber services" (i.e., the long-established and basic service of retransmitting broadcast signals to *all* subscribers) and not to new and experimental services, such as pay cable, requiring the investment of risk capital and long-range planning (26a-27a). The FCC made this distinction crystal clear. See e.g., *Cable Television Report and Order*, 36 F.C.C.2d 143, 209 (1972) ("services regularly furnished to *all* subscribers") (emphasis added); *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 199-200 (1974).

*State Labor Relations Board*, 330 U.S. 767, 774 (1946) (federal preemption may be effected "where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate").<sup>16</sup> This is a stronger preemption case than *Bethlehem* because it does not merely involve the failure of a federal agency to act. Here, over almost a decade, the FCC clearly and explicitly refused to regulate rates and specifically directed states and localities not to interfere in this area. Compare *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.) *cert. denied*, 425 U.S. 992 (1976). Because there is a clear and explicit conflict between federal and state policies, this is a classic case of federal preemption.

Finally, petitioners suggest that there was an inadequate factual record in the numerous FCC rulemaking proceedings for the agency to decide that preemption was desirable in its expert judgment. But since petitioners did not seek judicial review of the FCC preemption decisions, they cannot now collaterally attack the sufficiency of the FCC record.<sup>17</sup> Moreover, the petitioners' failure to raise

16. To same effect, see *Ray v. Atlantic Richfield Company*, 98 S.Ct. 988 (1978).

17. Communications Act of 1934, 47 U.S.C. §402(a) (1962, Supp. 1976); The Administrative Orders Review Act, 28 U.S.C. §2342 (Supp. 1977); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69, 71 (1971); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127, 1132 (6th Cir. 1973); *Morrisseau v. Mt. Mansfield Television, Inc.*, 388 F. Supp. 512, 515 (D. Vt. 1974).

the issue of the sufficiency of the FCC's record in the District Court is another reason why they may not do so now.<sup>18</sup>

Finally, assuming that the sufficiency of the FCC's records in many rulemaking proceedings over the past decade was an appropriate subject for review at this time, the FCC clearly acted properly and within its discretion in opting for free marketplace experimentation rather than bureaucratic interference. It is obvious that a new industry, subject to vigorous competition from entrenched media and STV whose prices are not controlled, would be injured by price controls. Attempts by thousands of local officials to fix rates of national pay cable networks supplying programs to cable systems scattered across the nation, or to set the prices of individual cable systems charging separate prices for thousands of different programs, would be harmful and inhibiting. It would be an administrative nightmare.<sup>19</sup> Fully aware of those factors, the FCC was justified in acting on the basis of its accumulated expertise and predictions of future consequences.

18. *Singleton v. Wulff*, 428 U.S. 106, 119-21 (1976); *Hormel v. Helvering*, 312 U.S. 552, 536 (1941); *Jhirad v. Ferrandina*, 536 F.2d 478, 486 (2d Cir. 1976); *Wilkerson v. Meskill*, 501 F.2d 297, 298 (2d Cir. 1974); *Terkildsen v. Waters*, 481 F.2d 201, 205 (2d Cir. 1973).

19. Warner Cable Corp. offers approximately 5,000 different pay programs a year (movies, sports, college courses, operas, etc.)—each program priced individually—on its revolutionary 30-channel, two-way cable experiment in Columbus, Ohio. This widely-heralded and multi-million-dollar operation, which may influence cable's future development, could not have been launched in New York because of the impact of the State Commission's price-control philosophy on a service involving thousands of prices which vary from day to day. See the testimony of the Chairman of Warner Cable Corp. before the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation, Oversight Hearings on Cable Television, 95th Cong., 1st Sess., 1977, at 73.

*United States v. Southwestern Cable Co.*, 392 U.S. 157, 176-77 (1968); *FCC v. National Citizen's Committee for Broadcasting*, 58 S.Ct. 2096 (1978).

To permit price controls by thousands of officials across the United States, particularly as to a service which is largely provided through national networks today, would conflict with Chief Justice Burger's statement that "[F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications." *General Telephone Co. of Cal. v. FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

Such attempts at price controls, moreover, would chill a new medium and sensitive First Amendment interests. Thus, *The Report to the President of the Cabinet Committee on Cable Communications* (1974), strongly endorsing federal prohibition of price regulation of pay cable programs, concluded (at 38-39) that such regulation was not only unnecessary but "inevitably would lead to regulation of program and information content, since rate regulation would ultimately have a bearing on the nature, quantity and quality of the services being sold."

## Conclusion

**For the foregoing reasons, the petitions for writs of certiorari should be denied.**

Respectively submitted,

STUART ROBINOWITZ  
ROBERT S. SMITH  
SUSAN P. CARR  
JACK A. HORN

PAUL WEISS, RIFKIND,  
WHARTON & GARRISON  
345 Park Avenue  
New York, New York 10022

*Attorneys for Respondents*  
*Brookhaven Cable TV, Inc.*,  
*Capitol Cablevision, Inc.*,  
*Samson Cablevision Corp.*,  
*Teleprompter Electronics Corporation*,  
*Warner Cable of Olean, Inc.*,  
*National Cable Television Association, Inc.*,  
*New York State Cable Television*  
*Association, and*  
*Home Box Office, Inc.*

September 22, 1978

Nos. 77-1835 and 77-1845

Supreme Court, U. S.

FILED

SEP 28 1978

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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NATIONAL ASSOCIATION OF REGULATORY UTILITY  
COMMISSIONERS, PETITIONER

v.

BROOKHAVEN CABLE TV, INC., ET AL.

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ROBERT E. KELLY, ET AL., PETITIONERS

v.

BROOKHAVEN CABLE TV, INC., ET AL.

---

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

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BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

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ROBERT R. BRUCE  
*General Counsel*

DANIEL M. ARMSTRONG  
*Associate General Counsel*

GREGORY M. CHRISTOPHER  
*Counsel*

LAUREN J. BELVIN  
*Counsel*  
*Federal Communications Commission*  
*Washington, D.C. 20554*

WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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---

(1)

## OPINIONS BELOW

The opinion of the court of appeals (77-1845 Pet. App. 1a-8a) is reported at 573 F.2d 765. The opinion of the district court (*id.* at 9a-28a) is reported at 428 F. Supp. 1216.

## JURISDICTION

The judgment of the court of appeals was entered on March 29, 1978. The petition for a writ of certiorari was filed in No. 77-1835 on June 26, 1978, and in No. 77-1845 on June 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Federal Communications Commission may preempt regulation by the states of pay cable television rates where state regulation conflicts with the Commission's objective of fostering growth of the pay cable television industry.

## STATEMENT

1. In 1968 this Court sustained the Federal Communication Commission's jurisdiction to regulate cable television systems, and announced the standard governing the Commission's authority in this area. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *Southwestern Cable* held that the Commission's authority to regulate cable television includes regulation that is "reasonably ancillary to

the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 178.

One year later, the Commission took steps to extend the scope of cable television services by requiring certain cable television systems to originate non-broadcast programs for their subscribers.<sup>1</sup> See *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d 201 (1969). The Commission did not, however, attempt to prescribe the types of nonbroadcast programs or services that would be appropriate, preferring instead "to afford a period for free experimentation and innovation by the cable operators." 20 F.C.C. 2d at 214. Consistent with its policy favoring free innovation, the Commission determined that "state or local regulations or conditions inconsistent with these Federal regulatory policies are \* \* \* preempted." 20 F.C.C. 2d at 223. See also, *In re Clarification of CATV, First Report as to Scope of Federal Preemption*, 20 F.C.C. 2d 741. (1969).

The Commission's mandatory origination rule was subsequently upheld by this Court in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). The Court concluded that the Commission's rule was within its jurisdiction because the rule furthered

<sup>1</sup> *Southwestern Cable* had considered cable television systems used to "receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers." 392 U.S. at 161. The Court noted, however, that cable television systems were also capable of originating their own programs. *Id.* at 162 n.9.

“the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services \* \* \*.” *Id.* at 667-668 (plurality opinion); see also, the concurring opinion of Mr. Chief Justice Burger at 676.

2. In 1972, the Commission promulgated additional rules governing cable television systems. The Commission adopted a “deliberately structured dualism,” permitting state authorities to regulate the local incidents of cable television service while preempting regulation of subjects requiring uniform federal supervision. See *Cable Television Report and Order*, 36 F.C.C. 2d 143, 207 (1972). Specifically, the Commission permitted state authorities to regulate services “regularly furnished to all subscribers.”<sup>2</sup> 36 F.C.C. 2d at 209. However, the Commission prohibited state regulation of cable television transmission of nonbroadcast programs.<sup>3</sup> 36 F.C.C. 2d at 193.

<sup>2</sup> The states were permitted to regulate rates for the regular transmission of broadcast programs, as described in note 1, *supra*. State regulation of rates for these established services was deemed appropriate because such services had been in existence for 25 years and “accumulated experience” satisfied the Commission that state regulation would not thwart development. 36 F.C.C. 2d at 209.

<sup>3</sup> Subscribers pay special rates for access to those channels offering special nonbroadcast entertainment and educational programs or for the number of such programs transmitted. This service is designated “pay cable television.” See 77-1845 Pet. App. 10a-11a.

In 1974, the Commission reiterated that the “regular subscriber services” that state authorities were permitted to regulate “[do] not include specialized [pay cable] programming for which a per-program or per-channel charge is made \* \* \*. After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level.” *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Dockets 20018 et al.*, 46 F.C.C. 2d 175, 199 (1974). The Commission added that “[n]o one has any firm idea about how any of these [pay cable] services will develop or how much they will cost,” thus making it appropriate temporarily to preempt rate regulation and permit rates to adjust flexibly to reflect actual costs. Such flexibility would serve the purpose of encouraging new entry and development. *Id.* at 200. See also, *Report and Order in Docket 20272*, 54 F.C.C. 2d 855, 861-863 (1975); *Notice of Inquiry in Docket 20767*, 58 F.C.C. 2d 915, 915-916 (1976).

3. In March 1976, the New York State Commission on Cable Television (CCT), which had participated in the Commission proceedings cited above, issued an interpretation captioned *Clarification of Commission Policy* (77-1845 Pet. App. 35a-44a), requiring rates for pay cable television services to be set forth in municipal franchises and prohibiting rate changes without prior approval by both the municipal

authorities and CCT. In taking that position, CCT stated that it "fail[ed] to agree with the legality of the FCC's preemptive policy," and also questioned the "wisdom" of preemption. *Id.* at 42a. CCT declared that "active enforcement" of its rate regulation program would ensue. *Id.* at 44a.

Brookhaven Cable TV, Inc., one of the respondents herein, subsequently brought suit in the district court, seeking a declaration that CCT's announced rate regulation program conflicted with the Commission's determination and was void under the Supremacy Clause of the Constitution.<sup>4</sup> The district court granted summary judgment in favor of the plaintiffs, holding that the Commission had jurisdiction to preempt state regulation of pay cable television rates and that it had validly preempted state law in this respect (77-1845 Pet. App. 9a-31a). The court of appeals affirmed that ruling, noting that the Commission's preemption of rate regulations would allow the new industry to develop in a free market environment. The court concluded that the Commission's action was reasonably ancillary to the statutory objective of increasing program diversity and expanding the range of services available to viewers (77-1845 Pet. App. 4a). The court also found that the Commission's authority had been validly exercised through its various interpretative releases, and that petition-

<sup>4</sup> National Association of Regulatory Utility Commissioners (NARUC) intervened in the district court in support of the defendants. The Commission and the United States intervened in support of the plaintiffs.

ers had "ample opportunities to attempt to persuade the FCC to their point of view" (*id.* at 6a).

### ARGUMENT

The decision of the court of appeals is consistent with this Court's decisions construing the Commission's authority to regulate cable television services, and it conflicts with no decision of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioners contend that the Commission's authority to regulate cable television is not sufficiently broad to justify preemption of state rate regulation. Both petitioners agree that this Court's decisions in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), provide the governing legal standards (77-1845 Pet. 12; 77-1835 Pet. 8). Analysis of those decisions demonstrates the propriety of the Commission's action here.

*United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 167-168, confirmed the Commission's authority to regulate cable television services, relying on Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), which provides in pertinent part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio" (*id.* at 172-173). The Court noted that the statute gives the Commission "broad authority" over cable television (*id.* at 168), based on its "reg-

ulatory power over all forms of electrical communication \* \* \*” (*id.* at 172). The Court stressed that this was a “‘comprehensive mandate,’ with ‘not niggardly but expansive powers’” (*id.* at 173). This statutory delegation of authority provides a sufficient basis for regulatory action that is “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting” (*id.* at 178).

The breadth of the Commission’s ancillary powers over cable television was confirmed in *United States v. Midwest Video Corp.*, 406 U.S. 649, 662-670 (1972), which upheld the Commission’s requirement that certain cable television systems originate programs. The Court held that the requirement was proper because it served to increase the number of outlets for community self-expression and expanded the public’s choice of programs and services. These goals were “plainly within the Commission’s mandate for the regulation of television broadcasting” (*id.* at 668), and could validly be pursued in the cable television medium (*id.* at 669). In his concurring opinion, Mr. Chief Justice Burger pointed out that although the regulation at issue was far reaching, the Commission has “generations of experience and ‘feel’ for the problem,” and should be allowed “wide latitude” (*id.* at 676).<sup>5</sup>

<sup>5</sup> See, also, *Federal Communications Commission v. National Citizens Committee for Broadcasting*, No. 76-1471 (June 12, 1978), slip op. 18-26, stressing the duty of the Commission to “promote the ‘public interest’ in diversification of the mass

As the court below properly concluded (77-1845 Pet. App. 4a, 19a-24a), the Commission’s decision to preempt state rate regulation of pay cable services was designed to serve the very objectives of increasing programming availability and program diversity that this Court held to be within the Commission’s jurisdiction in *Southwestern Cable* and *Midwest Video*. Moreover, its preemption decision was a reasonable exercise of that jurisdiction. If, as this Court held in *Midwest Video*, the Commission can require cable systems to originate programs or provide other kinds of services, surely it has the power to prevent states from undermining its regulatory objectives by imposing price constraints that might stifle the development of the programming diversity the Commission seeks to promote.<sup>6</sup> Furthermore, in concluding that state rate regulation would have that effect, the Commission was “entitled to rely on its judgment, based on experience \* \* \*.” *Federal Communications Commission v. National Citizens Committee for Broadcasting*, *supra*, slip op. 20; *United States v. Midwest Video Corp.*, *supra*, 406 U.S. at 676.

communications media.” In pursuing that goal, the expert agency is “entitled to rely on its judgment, based on experience” (*id.* at 20), and judicial review is limited to the correction of “‘arbitrary and capricious’” measures (*id.* at 26).

<sup>6</sup> Petitioners did not dispute in the courts below, and do not dispute in this Court, that the Commission’s preemption policy will have the effect of encouraging the development of new services and new programming.

Petitioner in No. 77-1835 also errs in contending (Pet. 15-20) that the mere "intent of the agency" is insufficient to preempt state regulation. The Commission has made an express and unequivocal determination that rate regulation would be inconsistent with the federal objective of promoting pay cable services. Explicit determinations by federal administrative agencies, made within their regulatory jurisdiction, have the force of federal law. They may not be frustrated by inconsistent state laws. See, e.g., *Free v. Bland*, 369 U.S. 663, 668-671 (1962); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947); *Ray v. Atlantic Richfield Co.*, No. 76-930 (March 6, 1978), slip op. 25. Otherwise, state law would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*id.* at 5).

The fact that the federal agency has not undertaken affirmatively to regulate, but rather has determined that there shall be no regulation, is immaterial. As this Court held in *Bethlehem Steel Co.*, *supra*, 330 U.S. at 774, state action may be preempted "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." In this case the Commission has expressly determined that "no such regulation is appropriate," and no inference about the matter is necessary. State authorities are no more free to countermand this express determination of the Commission than they would be to interfere with the

origination of programming required by the regulation upheld in *Midwest Video*.<sup>7</sup>

2. The lower court decisions cited by petitioners do not conflict with the ruling of the court of appeals. Petitioners candidly admit that the facts involved in the cases that they cite "are not directly relevant to the instant proceeding" (77-1835 Pet. 13), and the court of appeals properly distinguished them as inapposite (77-1845 Pet. App. 4a-5a).

In *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 25-34 (D.C. Cir. 1977), the court remanded the case to the Commission for further consideration of various regulations affecting the cable television industry, noting that the Commission had failed to indicate what statutory objectives would be served by its regulations. The court also noted potential restraints on competition inherent in

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<sup>7</sup> *Head v. New Mexico Board*, 374 U.S. 424 (1963), and *T.V. Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd*, 396 U.S. 556 (1970), are not to the contrary. In *Head*, this Court held that preemption would not be implied where the Commission's powers remained "dormant and unexercised" and where "there has been no showing of any conflict between this state law and the federal regulatory system, or that the state law stands as an obstacle to the full effectiveness of the federal statute" (374 U.S. at 432). Here, of course, the Commission's powers have been exercised in the clearest possible manner, and no "implied" preemption issue arises. In *T.V. Pix*, the court specifically recognized that "[t]he need for the greatest flexibility commands the desirability of vesting in the Commission the power of Congress to preempt or not to preempt areas of control which might otherwise be invaded by the states" (304 F. Supp. at 465).

the regulations, which needed to be justified. *Id.* at 36-42. Neither question is presented here. *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601, 614-616 (D.C. Cir. 1976), simply held that Commission regulation of private, non-video cable communications did not serve a valid statutory goal (such as enhancing program diversity), the court noting that "point to point communications \* \* \* which involve one computer talking to another or a citizen calling his city counsel, have no relationship whatever" to traditional public broadcast concerns. Finally, in *Midwest Video Corp. v. Federal Communications Commission*, 571 F.2d 1025 (8th Cir. 1978), petitions for cert. pending, Nos. 77-1575, 1648 and 1662, the court of appeals invalidated the Commission's channel capacity and access regulations. Although we believe that the court erred in concluding that those regulations were beyond the Commission's jurisdiction,\* the issues in that case bear little relation to the issue presented here. Whether the Commission has jurisdiction to require minimal channel capacity and to require operators to provide access to certain groups is quite different from the question whether the Commission, in furtherance of its objective of promoting pay cable services, may prohibit rate regulation by the states. There is therefore no need to

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\* See Brief for the United States in Nos. 77-1575, 1648, and 1662 at 8-12. We are furnishing copies of that brief to petitioners.

defer decision on this case pending disposition of the petitions in that case.

3. Petitioners in No. 77-1845 also argue that the Commission failed to give them a "direct opportunity" to raise their objections to preemption (Pet. 17-18).

As the court of appeals specifically found, petitioners "participated in the 1974 [Commission] proceedings cited above, and had ample opportunities to attempt to persuade the FCC to their point of view—which they did [attempt to do]—and to take an appeal when they failed—which they did not" (77-1845 Pet. App. 6a). In fact, petitioners had several opportunities to raise their "objections" to preemption. In 1970, the Commission advised the public of proposed rulemaking and held hearings to determine which aspects of cable television regulation should be left to the states. *Notice of Proposed Rulemaking in Docket 18892*, 25 F.C.C. 2d 50, 51-53 (1970). Subsequently, in a rulemaking proceeding captioned *First Report and Order in Docket 19554*, 52 F.C.C. 2d 1 (1975), CCT filed written comments with the Commission and participated in hearings in which it asserted its view that it should retain authority to regulate pay cable rates. Hearing Transcript, November 7, 1973, Vol. 3, at 609-620. Both petitioners filed comments in the Commission's hearing on duplicative and excessive regulation of cable television, *Report and Order in Docket 20272*, 54 F.C.C. 2d 855, 856 n. 4 (1975), and petitioners participated in other proceedings before the Commission dealing with state

and federal authority over cable television and opposed preemption of state control.\*

### CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.  
*Solicitor General*

ROBERT R. BRUCE  
*General Counsel*

DANIEL M. ARMSTRONG  
*Associate General Counsel*

GREGORY M. CHRISTOPHER  
*Counsel*

LAUREN J. BELVIN  
*Counsel*  
*Federal Communications Commission*

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\* See, e.g., *Report and Order in Docket 20020*, 50 F.C.C. 2d 61, 63-64 (1974); *Report and Order in Docket 20021*, 50 F.C.C. 2d 761, 767 (1975); *Report and Order in Docket 20024*, 50 F.C.C. 2d 43, 45 (1974). See also *Report and Order in Docket 20018*, 49 F.C.C. 2d 470, 472-474 (1974).

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